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Supreme Court, U.S.
FILED

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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

MICHAEL B. KING,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S JURISDICTION STATEMENT

AMENDED

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70 pp

QUESTION PRESENTED

1.

The district court erred in denying appellant's motions to intervene as a matter of right in the declaratory action to determine whether the State of Georgia's senate redistricting map unlawfully diluted the voting strength of African-Americans in violation of section 5 of the 1965 Voting Rights Act.

2.

The district court erred in denying appellant's motion to stay the Section 5 declaratory proceedings pending a decision on appellant's renewed motion for leave to intervene.

3.

The district court erred in entering a decision on the merits of the State of Georgia's Section 5 declaratory action after notice of appeal of the order, denying the renewed motion to intervene, was filled.

4.

The district court erred in considering the State of Georgia's revised senate district map under Section 5 of the 1965 Voting Rights Act after notices of appeal of the orders and judgment, denying the renewed motion for leave to intervene and motion for reconsideration, were filed.

5.

The district court erred in holding that the State of Georgia's revised senate redistricting map did not dilute the voting strength of African Americans in violation of Section 5 of the 1965 Voting Rights Act.

6.

The district court erred in denying appellant's motion to intervene for purpose of appeal.

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The Order and Judgment granting the appellee's request for declaratory judgment was entered on June3, 2002 and is included herein as Appendix A. The order denying appellant's motion for leave to intervene an appeal was entered on July 2, 2002 and is included herein as Appendix C.

STATEMENT OF JURISDICTION

This appeal arises from Order and Judgment denying appellant's motions for leave to intervene in the State of Georgia's declaratory action brought under Section 5 of the 1965 Voting Rights. Act. Timely notices of appeal was filed on April 5, 2002 and February 7, 2002. This Court has jurisdiction over this appeal pursuant to Section 5 of the 1965 Voting Rights Act, 42 U.S. C. Section 1973c.

STATUTORY PROVISION INVOLVED

Section 5 of the 1965 Voting Rights Act, 42 U.S.C. Section 1973 provides: Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect shall enact or seed to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or Color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the

qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Codes and any appeal shall lie to the Supreme Court.

STATEMENT OF CASE

1.

On October 10, 2001, the State of Georgia filed its declaratory action under section 5 of the 1965 Voting Rights Act, requesting the district court to enter a judgment that the state senate map did not have a discriminatory purpose or effect.

2.

The Attorney General, Ralph F. Boyd, Jr. and the United States of America filed a timely answer to the declaratory complaint.

3.

On December 19, 2001, appellant filed his motion for leave to intervene as a third-party defendant in the declaratory action.

4.

On December 21, 2001, the district court denied appellant's motion for leave to intervene because the court was unable to determine whether appellant's interests were adequately represented by the existing parties.

5.

On December 31, the defendants identified their position with respect to the appellee's redistricting map.

6.

On January 4, 2002, Jones, a second applicant for intervention, filed her renewed motion to intervene. On January 10, 2002, the district court granted Jones motion to intervene and required Jones to comply with the Court's initial scheduling and pretrial order. The district court did not serve appellant with a copy of the order granting Jones' motion to intervene. Appellant also had not been served with a copy of the scheduling order and Jones' motion to intervene.

7.

On January 15, 2002, appellant filed his renewed motion for application to intervene as a third-party defendant in the declaratory action.

8.

On January 15, 2002, the district court issued an order directing the parties to file responses to appellant's motion to intervene by no later than January 17, 2002. The plaintiff filed timely response, opposing appellant's motion to intervene.

9.

On January 18, 2002, the district court faxed appellant a copy of the December 20, 2001 scheduling order per appellant's January 18, 2002 phone request. The scheduling order set a pretrial conference for parties on January 25, 2002. Appellant did not appear for the pretrial conference the district court had not served him with notice that he was invited to appear at the conference.

10.

On January 30, 2002, the district court denied appellant's motion for application to intervene as a third-party defendant. The denial was based on appellant's absence from the January 25, 2002 pretrial conference. The court also stated that appellant's motion to intervene was untimely.

11.

On February 4, 2002, the district court began hearing evidence concerning the declaratory complaint.

12.

On February 5, 2002, appellant filed his notice of appeal of the order denying his renewed motion intervene by expressed mail. The notice was stamped filed on February 7, 2002. Appellant also filed his motion for reconsideration and motion to stay the hearings on the declaratory complaint.

13.

The district court proceeded with the evidentiary hearing and heard closing arguments on February 26, 2002.

14.

On April 5, 2002 the district court entered a final Order and Judgment on the declaratory complaint. In this Order, the court denied appellant's motion for reconsideration and motion to stay hearing. The court stated that the notice of appeal divested it of jurisdiction to consider the motions.

15.

In the April 5, 2002 Order and Judgment, the district court denied the plaintiff a declaratory judgment concerning the senate redistricting map.

16.

On April 17, 2002, appellant filed a notice of appeal of the final Order and Judgment.

17.

On April 8, 2002, the plaintiff requested the district court to amend its April 5, 2002 judgment for the purpose of retaining jurisdiction to consider a revised senate map. Appellant was not served with a copy of this motion.

18.

The defendants did not file a statement of opposition to the motion. Intervenor Jones filed a response, opposing the motion.

19.

On April 9, 2002, the district court modified its April 5, 2002 Order a Judgment and retained jurisdiction to consider the plaintiff's revised map.

20.

On April 17, 2002, the plaintiff filed the revised senate map. On April 18, 2002, the plaintiff filed a memorandum of law in support of the revised map. Appellant was not served with a copy of the revised map and memorandum.

21.

The defendant did not oppose the revised senate map. Intervenor Jones argued that the plaintiff did not meet its burden under Section 5 concerning the revised map.

22.

At the April 18, 2002 status hearing, the plaintiff and intervener argued that he evidentiary record developed during the February 4, 2002 hearing supported their positions. The plaintiff and intervener agreed to a stipulated trial on the record.

23.

The court treated the plaintiff's submission of the revised senate-redistricting map as a new complaint for declaratory judgment. The court did not provide appellant with notice of this action.

24.

On June 3, 2002, the district court granted the plaintiff declaratory judgment on the "new" complaint. The court concluded that the revised senate map did not have the purpose and will not have the effect of denying or abridging the right to vote on account of race.

25.

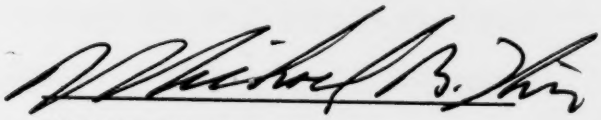
On July 5, 2002, appellant filed his third notice of appeal.

CONCLUSION

This Court has jurisdiction to consider this appeal and reverse and vacate the district court's Orders and Judgment, granting the appellee's request for the declaratory judgment and order denying appellant's motion for leave to intervene on appeal.

This 6th day of September 2002.

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-2111 (EGS HTE LFO)
THREE-JUDGE COURT

Filed June 3, 2002

THE STATE OF GEORGIA,
Plaintiff,

versus

JOHN ASHCROFT, et al.,
Defendants.

Before: EDWARDS, Circuit Judge,
SULLIVAN, District Judge, and
OBERDORFER, Senior District Judge.

Opinion for the court filed by District Judge Sullivan, in which Circuit Judge

Edwards and Senior District Judge Oberdorfer joins. Concurring opinion filed by Senior District Judge Oberdorfer.

Sullivan, District Judge:

On April 5, 2002, the court declined judicial preclearance to Georgia Act No. 1EX6, a plan for redistricting of Georgia State Senate. However, at the request of the State of Georgia, this court maintained jurisdiction of the case and permitted the State to file a new reapportionment plan for the Senate districts. The State now asks this court to enter a declaratory judgment pursuant to Section 5 of the Voting Rights Act that a revised Senate redistricting plan, Georgia Act No. 444, does not "have the purpose and will not have the effect of denying or abridging the right to vote

on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973c.

I. Procedural History

On April 5, 2002, this court issued an Opinion and Order ("Opinion") granting the State of Georgia a declaratory judgment under Section 5 of the Voting Rights Act, 42 U.S.C § 1973c, with respect to the Congressional and State House redistricting plans enacted during the 2001 special session of the Georgia General Assembly. *See* Civil Action No. 01-2111, April 5, 2002 Op. & Order. That same Opinion denied the State's motion for declaratory judgment under Section 5 with respect to the State Senate redistricting plan enacted during the 2001 special session, Act No. 1EX6 ("2001 plan").

On April 8, 2002, the State of Georgia requested that this court amend its judgment of April 5, 2002, for the

purpose of retaining jurisdiction to consider a revised Senate Redistricting Plan. The United States filed a statement of non-opposition to the State's motion. The defendant-intervenors filed a response to the motion arguing that retention of jurisdiction would be improper and that plaintiff was required to file a new lawsuit in this court, if it intended to seek judicial preclearance. On April 9, 2002, in recognition of the fact that the qualifying period for candidates for the Georgia State Senate is scheduld to be held from June 19 to June 21, the court modified its judgment and retained jurisdiction to permit plaintiff to submit a revised plan for the redistricting of the Georgia State Senate within twenty days.

On April 15, 2002, the defendant-intervenors filed a motion for clarification of the order amending

judgment, essentially asking the court to confirm that the burden of proof remained on the State to demonstrate that the revised plan did not violate Section 5.

On April 17, 2002, the State filed the revised Senate redistricting plan ("2002 plan"), passed by the Georgia General Assembly and signed into law as Act No. 444 on April 11, 2002 by the Governor of Georgia. The State, in accordance with court order, also filed a memorandum in support of the plan. At an April 18, 2002 status hearing, plaintiff represented that it did not intend to submit any additional evidence in support of the revised plan and that no discovery was needed. The court ordered the defendants and defendant-intervenors to notify the court in their responses to the plaintiff's memorandum if they believed that additional discovery was needed.

The United States indicated that it no longer contended that the Senate plan violated Section 5, while the defendant-intervenors argued that the State had again failed to meet its burden. No party requested additional discovery or sought to file new evidence with the court. At the April 18,2002 status hearing, the court also inquired of the parties whether there was a need to have the plaintiff file a new complaint, or to have the parties file motions for summary judgment. Relying on *Busbee v. Smith,* 549 F. Supp. 494 (D.D.C. 1982),[1] the parties argued that no procedural impediments barred the court from resolving the merits of the case on the basis of the plan and the responses to the plan.

The plaintiff and defendant-intervenors both argue that the evidentiary record developed during the court's review of the 2001 Senate redistricting plan supports their

positions. However, the parties' initial briefs failed to point to record evidence to support their positions. The cursory nature of the parties' briefs prompted the court to require the parties to file proposed findings of fact and conclusions of law explicitly identifying the evidence upon which the parties relied.

In a conference call on May 17 2002,[2] at the suggestion of the court, the parties agreed that, in the event that the court concluded that the evidence raised a genuine issue of material fact, thus precluding the granting of summary judgment, the court could resolve the case as a stipulated trial on the record. *See also Benoit v. McKenzie*, Civ. Action No. 84-2657, 1988 WL 4238 (D.D.C. Jan. 5, 1988).

The court treats the plaintiff's submission of the revised Senate redistricting plan as a new complaint for declaratory judgment. Retention of

jurisdiction was appropriate and in the interests of justice insofar as a new complaint would have come to this three-judge court as related to the court's previous review of the State's Congressional and State Senate and House redistricting plans. As discussed below, the court construes the case as a stipulated trial on the entire record after finding that genuine issues of material fact preclude entry of summary judgment.

II. Factual Background

The court's April 5, 2002 opinion contains a lengthy discussion of the demographics of the State of Georgia. Therefore, in this section, the court focuses its attention on the differences between the 2001 Senate redistricting plan and the revised 2002 plan.

The April 5, 2002 opinion scrutinized the redistricting proposed for thirteen benchmark Senate Districts with majority African American populations and Senate

District 34, which would have become a majority African American district under the 2001 plan. With the exception of Senate Districts 2, 12 and 26, the demographics of these districts are the same under the 2001 plan and under the revised 2002 plan.

The following chart summarizes the percentages of Black population ("BPOP"),[3] Black voting age population ("BVAP") and Black registered voters ("BREG") in Senate

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[3] As indicated in the court's April 5 opinion, plaintiff and the United States dispute the method of calculating the African American population of Georgia. *See* Opinion at 22-23. The court will refer to BPOP and BVAP calculated pursuant to Georgia's method of construing the census data. The United States has not presented any additional evidence; consequently, the court is unable to determine the relevant BPOP and BVAP percentages under the revised plan pursuant to the Attorney General's method of interpreting the census data.

Districts 2, 12 and 26 under the benchmark plan ("BM"), the 2001 plan ("2001") rejected by the court and the 2002 plan ("2002") submitted for review.

S.D.		BPOP			BVAP			BREG	

See Pl.'s Proposed Findings of Fact & Conclusions of Law ("PPFF") at ¶28.

The benchmark plan has thirteen districts with majority African American populations. These same thirteen districts have populations in which the majority of registered voters are African American. Twelve benchmark districts have majorities of BVAP ranging from 54.73% to 88.91%, and benchmark Senate District 44 has a BVAP of 49.62%.

The 2002 plan proposes thirteen districts with majority African American populations. Eleven proposed districts would have majorities of African American registered voters. Proposed Senate Districts 22 and 34 would have populations where registered voters were respectively 49.44% and 49.50% African American. Under the 2002 plan, according to Georgia's calculation of BVAP, thirteen districts would have majority BVAP"s, ranging from 50.54% to 64.14%.

The BVAP of Senate District 34, the newly created majority-minority district, falls slightly below 50% to 49.53% when BVAP is calculated according to the United States' methodology. *See* U.S. Ex. 110; April 5, 2002 Op. & Order at 65. Consequently, pursuant to the United States' calculations, there would be twelve districts with majority BVAPs under the revised plan.

The boundaries of Senate Districts

2, 12 and 26, as drawn by the 2002 plan differ in several significant ways from those drawn by the 2001 plan. Essentially, the districts have been created with an eye toward maintaining minority voting strength by keeping within the current benchmark districts. In addition, the revised plan's districts would not include majority white precincts that are not within the benchmark districts, but which the 2001 plan had proposed to add to Districts 2, 12 and 26.

In particular, unlike the 2001 plan, the 2002 plan would not include Tybee Island, Whitemarsh and Isle of Hope in Senate District 2. *See* Pl. Ex. 31A. The Port Wentworth community, as well as the majority African American precincts of Secondary Tech, Garden City Community Center and Wilder Memorial Baptist, would included in Senate District 2 under the revised plan. *Id.* The revised plan would keep within

Senate District 12 three precincts with majority African American registration figures, which had been removed under the 2001 plan. In addition, the predominantly white precincts of Raiford, Putney and Century, included in Senate District 12 under the 2001 plan, would not be included in the revised District 12. *Compare* Pl. Ex. 4A with Pl. Ex. 32A.

In Senate District 26, the revised plan would include significant portions of Twiggs and Wilkinson counties, including the City of Jeffersonville, which have substantial African American populations. Pl. Ex. 33A. Several predominantly rural, white precincts in Monroe, Butts, Jones and Jasper Counties are not included in the 2002 plan's Senate District 26. These precincts had been included in the 2001 plan's proposed district.

II. Standard of Review

As an initial matter, the court

addresses the plaintiff's repeated assertions that some different standard or quantum of proof is applicable because this case is now in a "remedial" posture. Plaintiff, with the agreement of the United States and defendant-intervenors, initially cited *Busbee v. Smith* for the proposition that this court could properly retain jurisdiction in order to permit the State to submit a revised redistricting plan. 549 F. Supp. 494 (D.D.C. 1982). However, plaintiff also relies on *Busbee* to support a conclusion that this matter is in a "remdial" posture. While continuing to recognize that it bears the burden of proof, the State suggests that the "remedial" nature of the court's present review mandates a more flexible procedural and evidentiary standard. The court wholly rejects the idea that its current review may be in any way less searching or comprehensive than its former review of the 2001 plan. Indeed,

on this point *Busbee* is instructive. The *Busbee* court refused to preclear Georgia's Congressional redistricting plan because it found that the boundary between the Fourth and Fifth Congressional Districts, which essentially bifurcated a concentrated African American population, had been drawn with a discriminatory purpose. 549 F. Supp. at 517-18. When the State suggested that the court's order applied only to the Fourth and Fifth Districts, and manifested an intent to go forward with elections in the remaining Congressional Districts, the Court clarified that it had found that the redistricting plan "as a whole" was in violation of Section 5 and unenforceable. Civ. Action 82-0665, Order, Aug. 2, 1982, at 2 (emphasis in original). Thus, while the State legislature ultimately chose to redraw only the Forth and Fifth Districts, the

court explicitly recognized the possibility that a revised plan might affect other districts." Id. Similarly, we have emphasized that, although we have focused on three individual Senate Districts, we are obligated to consider whether the plan as a whole contravenes Section 5. This obligation is unchanged by the submission of a second, revised plan. Plaintiff bears the burden of demonstrating by a preponderance of the evidence that the 2002 Senate redistricting plan does not have a retrogressive purpose and will not have a retrogressive effect. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 469, 107 S. Ct. 794 (1987). A preponderance standard. . .requires merely that the fact-finder believe that the existence of a fact is more probable than the non-existence of that fact." *United States v. Smith*, 267 F.3d 1154, 1161 (D.C. Cir. 2001). In other words, "'[t]he burden of showing something by a

preponderance of the evidence. . .simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [the trier of fact] may find in favor of the party who has the burden to persuade the [court] of the fact's existence.'" *Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 137 n.9, 117 S. Ct. 1953 (1997) (quoting Concrete Pipe & Products of Cal., Inc, v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 622, 113 S. Ct. 2264 (1993)). Thus, for the plaintiff to succeed at a stipulated trial, this court need only find that the evidence that the revised Senate redistricting plan will not have a retrogressive effect is more convincing than the evidence offered to prove that the plan will result in retrogression. See id. (citing Greenwich Collieries v. Director, OWCP, 990 F.2d 730 (3d Cir. 1993)). Because we find that there are genuine

Issues of material facts in dispute that preclude the entry of summary judgment, see Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986), we treat the case as a stipulated trial on the entire record. In considering the case as a stipulated trial, the court takes on the role of fact-finder. Thus, the State may prevail if the court determines that the evidentiary record supports a finding that it is more probable than not that the revised redistricting plan for the State Senate will not violate Section 5.

III. Analysis

Plaintiff seeds a declaratory judgment Pursuant to Section 5 that the 2002 redistricting plan for the Georgia State Senate does not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. 42 U.S.C.§ 1973c. Beer v. United States teaches

that Section 5 mandates that a voting change submitted for preclearance not be retrogressive in its effect; a covered jurisdiction may not enact a voting change that directly or indirectly diminishes the opportunities of African American voters to exercise their electoral power. 425 U.S. 130, 141, 96 S. Ct. 1357, 1364 (1976). Similarly, *Reno v. Bossier Parish School Board* instructs that only a retrogressive purpose will violate Section 5. 528 U.S. 320, 341, 120 S. Ct. 866 ("Bossier II"). We address the effect and purpose prongs of the Section 5 inquiry in turn.

A. Non-retrogressive Effect

1. Legal Standard

The court is faced with the challenge of predicting the effect of the revised Senate redistriccting plan on African American voting strength in Georgia. Plaintiff has offered little additional evidence in support of the revised plan, while defendant-

intervenors have chosen to present no new evidence, maintaining only that the State has failed to meet its burden of proof. The United States does not contend that the revised plan has a retrogressive effect and has presented no additional evidence.

Although the Attorney General does not contend that the revised plan is retrogressive, the State has chosen not to submit the plan to the Attorney General for administrative preclearance. For the reasons outlined in the April 5, 2002 majority opinion, the court has determined that the failure of the Attorney General to object to a plan does not moot the controversy, and that the court must hold the plaintiff to its burden of demonstrating that the proposed plan does not have a retrogressive effect or purpose.

We have previously rejected the notion that the court's retrogression

analysis is limited to a few disputed districts, holding that a Section 5 action necessarily calls for an analysis of the entire plan and its predicted effect. April 5, 2002 Op. & Order, at 107. Nevertheless, the April 5 2002 opinion focused on three proposed Senate Districts where there was evidence of racially polarized voting, which, when coupled with the demographics of the proposed districts, we found likely to result in a retrogressive effect.

Our previous opinion discusses at length the appropriate legal standard for assessing retrogression, and we review this standard here only briefly. Section 5 is a mandate that "the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush v. Vera*, 517 U.S. 952, 983, 116 S. Ct. 1941 (1966). Whether a given plan will have a retrogressive effect is a fact-specific

inquiry that focuses on whether a proposed voting change will diminish minority voting strength throughout the given jurisdiction.

As discussed in the April 5, 2002 Opinion, courts have frequently used the number of majority-minority districts as a shorthand for measuring minority voting strength. However, we also noted the dualistic nature of majority voting strength where voting patterns are such that only a majority or super-majority of minority voters will permit the election of minority candidates of choice. Yet, they may also diminish or stagnate minority voting strength by "packing" minority voters into a small number of districts, thus foreclosing the voters' ability to influence the outcome of elections in a greater number of districts.

Thus, finding that the "shorthand" method of counting majority-minority districts would not necessarily reflect

a plan's predicted effect on minority voting strength, the court undertook a careful, fact-intensive analysis of the full range of evidence presented to it. In particular, the court considered demographic evidence regarding the proposed plan, evidence of racial voting patterns and lay testimony regarding the predicted effect of the plan.

In addition, the court rejected the State's argument that the proposed Senate plan was an inevitable result of compliance with the constitutional principle of one person, one vote.[4]

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[4] The State and the defendant-intervenors appear to view the court's discussion of the constitutional principle of one person, one vote as an evidentiary factor to consider in determining whether the plan is retrogressive. However, the court's concern with one person, one vote principles stems from the State's argument, made in its briefs in support of the first Senate redistricting plan, that the decrease in BVAP in several of the majority-minority districts was inevitable and mandated by the constitutional principle of one person, one vote. The court rejected this "defense," finding that the State had offered no proof that such decreases were necessary for constitutional compliance, and that, indeed, the evidence suggested otherwise.

The court, however, was significantly hampered in its consideration of the issues by the failure of the parties to submit expert testimony addressing the relative effect of the 2001 plan on African American voting strength throughout the State.

2. Opportunities to elect candidates of choice

The crux of the court's finding that the 2001 Senate redistricting plan was more likely than not to diminish African American voting strength lies in the interplay between decreases in several majority-minority districts' BVAPs and evidence of significantly racially polarized voting. Although the court has commented extensively on this relationship between racially polarized voting and the demographics of the proposed districts, the State and defendant-intervenors would have the court analyze these two factors in isolation from on another. Such an

approach misses the mark because it fails to explain the ultimate effect of the plan on African American voting strength in the State. As the court noted in its April 5, 2002 Opinion, "[w]here there is evidence of racially polarized voting, a redistricting plan that reduces African American votes in a district with no offsetting gains elsewhere raises the specter of impermissible retrogression." April 5,2002 Op. & Order, at 5.

Nevertheless, contrary to the suggestion of defendant-intervenors, the State need not prove the "absence" of racially polarized voting. Clearly, this Section 5 does not require. Rather, the State must demonstrate that, to the extent that racially polarized voting *does* exist, the configuration of the proposed Senate Districts is not such that the plan, as a whole, will diminish African American voting strength.

The presence of racially polarized voting, and its effect of the redrawn districts, is a complicated matter. Nevertheless, as we have already remarked, the court's task is made more difficult by the failure of the parties to present evidence that would explain with precision how the degree or racially polarized voting found by Dr. Engstom will affect minority voting strength in districts with the demographics proposed by the 2002 redistricting plan.

When compared with the 2001 proposed Senate plan, only the boundaries, and hence the demographics, of Senate Districts 2, 12 and 26 have been altered in the revised 2002 plan. The court previously expressed concern that the BVAPs in five districts, including districts 2, 12 and 26, were reduced to bare majorities. However, the court focused its attention on districts 2,12, and 26 because there was evidence of

racially polarized voting in those districts that suggested that the accompanying reduction of BVAP to bare majorities would result in a retrogressive effect. The court held that the State had failed to meet its burden because it was more likely than not that racially polarized voting in these three districts with bare majorities of BVAP would result in a stat-wide diminution of minority voting strength.

There is still cause for concern under the 2002 redistricting plan. The 2002 plan calls for bare majorities of BVAP in Senate Districts 15 and 34, and a decrease of 12% that brings Senate District 22's BVAP to 51.51%. While there are thirteen districts with majority BVAP according to the State's calculations of BVAP, the BVAPs in eight of these proposed districts would decrease as compared with the benchmark

plan. These decreases range from 26.28% to 0.39%.[5]

On the other hand, the revised plan differs from the 2001 proposed plan in significant ways. Of the majority-minority districts created under the 2001 plan, six of the districts had BVAPs between 50.3% and 51.5%. *See* April 5, 2002 Op. & Order at 96. The revised plan has only two districts in this range, Senate District 15 and the newly created majority African American district, Senate District 34. Pl. Ex. 30C. Senate District 22 is just slightly above this range with

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[5] Specifically, a comparison of the demographics of senate districts (S.D.) under the benchmark plan and the revised 2002 plan shows the following changes in the districts' BVAP; in S.D. 43, -26.28%; in S.D. 38, -16.32%; in 11.76%; in S.D. 15, --11.18%; in S.D. 26, -7.06%; in S.D. 10, -6.52%; in S.D. 2, -6.08% in S.D. 36, -3.42%; in S.D. 12, -0.39%; in S.D. 39, 1.81%; in S.D. 34, 16.58%. U.S. Ex 118; PPFF ¶ 28; Pl. Ex. 25, app. III.

a BVAP of 51.51%. There are 10 districts in the revised plan with a BVAP over 54%. While under the benchmark plan, all of the majority-minority districts had BVAP percentages greater than 54%, only seven districts in the 2001 plan had BVAP percentages above 54%.

The likelihood that retrogression will result from the 2002 plan is significantly less where the demographics of the districts with evidence of racially polarized voting are changed to include higher percentages of BVAP. The effect of racially polarized voting on minority voting strength is clearly dependent on the demographics of a given district. In some districts, the impact of even severely polarized voting patterns may be minimal. For example, in a district with 70% BVAP, if a substantial majority of African American voters cast their ballots for a candidate, that candidate

is likely to be elected, even absent significant cross-over support from non-African American voters. In contrast, in a district with a bare majority of African American voting age population, even if a substantial majority of African Americans were to vote for a candidate, the outcome of the election is likely to be largely determined by the level of non-African American cross-over support for that candidate.

The only evidence of racially polarized voting before the court is in Senate Districts 2, 12 and 26. Under the revised Senate redistricting plan, the BVAP in Senate District 12 would remain practically the same, decreasing 0.39% from 55.43% to 55.04%. BVAP in Senate District 2 would decrease from 60.58% to 54.5% under the revised plan, and BVAP in Senate District 26 would decrease from 62.51% to 55.45%. The court is faced with the same evidence of racially polarized voting

that it considered in reviewing the 2001 Senate plan. Despite lengthy discussion by the court of how the plaintiff might counter evidence of racial polarization in these districts, plaintiff has chosen to offer no evidence to rebut the evidence presented by Dr. Engstrom and credited by the court. Therefore, the court continues to credit the findings of Dr. Engstrom. In particular, Dr. Engstrom found levels of white support for African American candidates of choice ranging from 8.9% to 43.6% [6] in Senate elections in benchmark district 2, ranging from 10.6 to 17.5% in Senate election in benchmark district 12, and ranging from 2.7% to 34.2% in Bibb County elections, which appears to fall within Senate District 26. U.S. Ex. 601, Table 2. The principle of

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[6] The court relies on Dr. Engstrom's calculations of white cross-over voting calculated pursuant to King's Ecological Inference.

non-retrogression means that Georgia's redistricting plan may not decrease African American voters' opportunities to elect candidates of choice. However, where racially polarized voting was present in a district under the benchmark plan and the BVAP of a district does not change, we cannot say that the persistence of racially polarized voting in any way decreases overall African American voting strength. Racially polarized voting in Senate District 12 is unlikely to result in retrogression because the district's BVAP is maintained at essentially the same level under the revised plan. There is no record evidence that would suggest that a 0.39% decreased in BVAP will result in a decrease in African American voting strength in the district, or will affect the overall impact of the plan.

The court is left to assess the impact of the decreases in BVAPs of

Senate Districts 2 and 26, given the level of racially polarized voting in those districts. The task presented is perhaps more difficult than our analysis of the previous Senate redistricting plan, where the parties created a voluminous record. Here, the State does not attempt to predict the impact of the decreases in BVAP given the evidence of racially polarized voting. Rather, Georgia simply states that the BVAP percentages in the proposed Senate Districts 2 and 26 and greater than they were in the first proposed redistricting. Defendant-intervenors, on the other hand, appear to rely on the unfounded proposition that the presence of any racially polarized voting means that a district- and hence, the plan - is retrogressive.

In the absence of any record evidence that specifically addresses the predicted impact of the levels of racially polarized voting found in

Senate Districts 2 and 26 on the ability of African American voters to elect candidates of choice in the redrawn districts, the court turns to other record evidence that touches on this issue.[7]

First, the court notes that, according to the election database compiled in Dr. David Epstein's report, since 1991, the African American candidate of choice won every open seat legislative election in Georgia where the BVAP was 54.00% or higher.

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7 Plaintiff attempts to rely on an answer by the United State's expert, Dr. Engstrom, to hypothetical question posed by plaintiff's counsel. Dr. Engstrom testified that, in a district with 50% BVAP, where 90% of African Americans voted for Democratic candidates and 30% of white voters would" cross-over" to vote for a Democratic Party candidate, he would expect the African American candidate of choice, the Democratic Party candidate, to win 65% of the votes. See Tr., 2/6/02 p.m. at 141-44. However, the assumptions underlying this hypothetical are not support by the record.

Pl. Ex. 25. Epstein presents no evidence of the level of racial polarization in the districts included in his database. Nevertheless, it is not insignificant that the revised Senate District 2 and 26 would have BVAP above 54.00%.

Furthermore, we note that our previous concerns that Senate Districts 2, 12 and 26 had BVAP percentages that placed them at the steepest portion of Dr. Epstein's "S curve," are no longer as weighty. While Dr. Epstein's analysis does not account for racially polarized voting, some level of racially polarized voting was necessarily a factor in the election results that he considered. In other words, it would appear to be a reasonable inference that, even with some level of racially polarized voting, as BVAP in a district moves progressively above a bare majority, the likelihood that an African American candidate of choice

will be elected also increases. Unfortunately, given the quality of evidence, we simple can not predict with any certainty the degree to which that likelihood will increase.

3 Lay testimony

The United State's witnesses, resident of Senate Districts 2,12 and 26, raised two types of concerns with the first proposed Senate plan. First, they testified that the removal of particular precincts from the districts, and the addition of others, would decrease the probability that an African American candidate of choice would be elected from the districts. Second, several of the witnesses testified that a bare majority of BVAP would not permit the election of an African American candidate of choice. Several residents from Senate District 2 testified that the addition to Tybee Island, Isle of Hope and Whitemarsh areas would make

it more difficult to elect African American candidates of choice because voters in those areas were predominantly white and conservative. The revised plan would remove these areas from Senate District 2, while adding majority black precincts in areas such as Garden City. Pl. Ex. 31A. In particular, Joe Murray Rivers, Chatham County Commissioner, testified that the removal of the precincts Secondary Tech, Garden City Community Center and Wilder Memorial Baptist would diminish African American electoral strength in Senate District 2. U.S. Ex. 508¶¶ 8-10. These three precincts are included in Senate District 2 pursuant to the revised plan. Pl. Ex. 31A. The defendant-intervenors Della Steel and Georgia Benton testified that they objected to the Senate redistricting plan because Port Wentworth was removed from Senate District 2. Pl. Dep. Design. Tabs 3 (Benton), 27 (Steele). Port Wentworth

is now contained within Senate District 2. Pl. Ex. 31A.

Several of the United States' witnesses from Senate District 12 voiced concerns that the 2001 plan for would have removed from the district Doughtery County precincts with majorities of African American registered voters. *See* U.S. Ex. 513 ¶¶ 24, 25 (J. White decl.); U.S. Ex. 511 ¶ 5 (A Williams decl.); U.S. Ex. 514, ¶ 7 (W. Wright decl.). Senate District 12, as drawn in the 2002 plan, includes three such precincts. Pl. Ex. 32A (Mock Road, Turner and Albany Middle School precincts from Doughtery County). In addition, three majority white precincts, which had been included in the district proposed by the 2001 plan and which witnesses testified would diminish minority voting strength in the district, have been removed from the district in the revised plan. The precincts identified by the United States witnesses as problematic in proposed Senate District 26 have also

been removed in the district drawn by the 2002 plan. In particular, the predominantly rural white precincts that Albert Abrams, a member of the Board of Directors for the Macon Chamber of Commerce, argued would decrease African American voting strength, are not within the redrawn district. *See* U.S. Ex. 515 ¶¶ 8-9 (Abrams decl.); Pl. Ex. 33A (majority white precincts of Monroe, Butts, Jones and Jasper Counties have been removed from revised District 26); *see* also U.S. Ex. 519, ¶ 9 (Hart decl.) (testifying that inclusion of precincts from northern Bibb, Butts, Jones and Monroe counties would decrease likelihood that minority candidate would be elected). Majority African American precincts from Twiggs and Wilkinson Counties, which are currently within Senate District 26, wold remain within the district pursuant to the 2002 plan. Burt Bivins, a member of the Bibb County Commission had identified these counties and, in particular, the City of

Jeffersonville, as important areas to include in Senate District 26 to maintain minority voting strength in the district. U.S. Ex. 517, ¶ 12 (Bivins decl.).

The court places less confidence in the Senate District residents' assessment of the level of BVAP necessary to ensure that African American candidates of choice be elected. While the witnesses may obviously draw on their political experience in the districts, the court is uncomfortable with identifying any "magic number" as the level of BVAP at which it can conclude African American voting strength has not been reduced. Nevertheless, it is telling that some of the witnesses testified that the closeness of the ratio of African American to non-African American population in the districts proposed by the 2001 plan would significantly affect minority voting strength. *See* Shinhoster dep. At 16. In the 2002

plan's proposed Senate Districts 2,12 and 26, such bare majorities are no longer present.

4. Overall effect of the 2002 plan Based on the evidence before us, we can not conclude that it is more probable than not that the 2002 plan will result in a reduction of African American voting strength. The 2002 plan decreases BVAP in the same number of majority- minority districts as did the 2001 plan, However, according to the plaintiff's methodology of calculation BVAP, the 2002 plan has thirteen districts with majority BVAP, where the benchmark plan only has twelve. While recognizing that benchmark plan only has twelve. While recognizing that benchmark Senate District 44 has a BVAP just under 50% is not insignificant for African American voting strength. The court, in its April 5,2002 Opinion, was most concerned by the evidence regarding voting patterns in Senate

Districts 2, 12 and 26. The evidence of racially polarized voting in these districts, in conjunction with the bare majorities of BVAP in the proposed districts, led the court to conclude that the 2001 plan was more likely than not to have a retrogressive effect. The 2002 plan presents concerns similar to those raised by the 2001 plan. Nevertheless, the BVAP in proposed Senate District 12 is essentially the same as that in the benchmark district. Consequently, the effect of racially polarized voting in the proposed district is not likely to be any different than its current effect. The effect of the 2001 plan on minority voting strength in Senate Districts 2 and 26 is more difficult to ascertain. The revised plan addresses district residents' concerns about particular precincts, the inclusion or exclusion of which the residents testified would negatively affect minority voting

strength. Thus, the court's inquiry comes down to the question of whether racially polarized voting in the proposed Senate Districts 2 and 26 would so negatively affect African American electoral strength in those districts that the court can find that the 2002 plan would have a retrogressive effect.

We, therefore, consider the evidence of racially polarized voting in proposed Senate District 2, which has a BVAP of 54.50%, and in proposed Senate District 26, with 55.45% BVAP, in conjunction with the fact that the 2002 plan addresses district residents' concerns regarding specific precincts and the addition of a majority-BVAP district. On the basis of the evidence, we find that it is more probable than not that the 2002 plan will not have a retrogressive effect on African American voting strength in the State of Georgia.

5. Non-retrogressive Purpose

Section 5 requires that the covered jurisdiction demonstrate by a preponderance of the evidence that the proposed voting change was not enacted with a retrogressive purpose. Bossier II, 528 U.S. 320, 341. While the plaintiff has not submitted any additional evidence other than the 2002 plan itself and the roll call of the General Assembly's vote on the plan, the court concludes that it can draw a reasonable inference from the course of events and from the nature of the changes made to Senate Districts 2, 12 and 26 that the revised plan was not created further any retrogressive intent.

CONCLUSION

Upon careful consideration of the entire record herein and the applicable statutory and case law. The court finds that the State of Georgia has demonstrated by a preponderance of the evidence that the State Senate redistricting plan, Georgia Act No. 444, does not have the purpose or effect of denying or abridging the right to vote on account of race or color. Accordingly, it is hereby

ORDERED that plaintiff's request for a declaratory judgment pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c,that the revised Senate redistricting plan, Act. No. 444, does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group is GRANTED.

An appropriate Judgment accompanies this Opinion and Order.

6-3-02
DATE

SIGNED
EMMET G. SULLIVAN
U.S. DISTRICT JUDGE

6-3-02
DATE

SIGNED
HARRY T. EDWARDS
U.S. CIRCUIT JUDGE

6-3-02
DATE

SIGNED
LOUIS F. OBERDORFER
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-2111 (EGS HTE LFO)
THREE-JUDGE COURT

Filed June 3, 2002

THE STATE OF GEORGIA,
Plaintiff,

versus

JOHN ASHCROFT, et al.,
Defendants.

Before: EDWARDS, Circuit Judge,
SULLIVAN, District Judge, and
OBERDORFER, Senior District Judge.

JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58 and for the reasons stated by the court in its Memorandum Opinion and Order docketed this same day, it is hereby

ORDERED and ADJUDGED that the Clerk shall enter final judgment in favor of plaintiff with respect to Georgia's State Senate reapportionment plan, Act No. 444. IT IS SO ORDERED FOR THE THREE-JUDGE COURT.

6-3-02
DATE

SIGNED
EMMET G. SULLIVAN
U.S. DISTRICT JUDGE

OBERDORFER, J., CONCURRING.

I concur in the court's opinion for substantially the reasons there stated, together with those advanced in my dissent from the court's April 5, 2002 opinion related to the state Senate.

6-3-02
DATE

SIGNED
LOUIS F. OBERDORFER
U.S. DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:01CV2111 (EGS HTE LFO)
THREE-JUDGE COURT

Received July 5, 2002

THE STATE OF GEORGIA,
Plaintiff,

versus

JOHN ASHCROFT, et al.,
Defendants.

And

MICHAEL B. KING,
Applicant for Intervention

MICHAEL B. KING'S THIRD NOTICE OF APPEAL

Notice is hereby given that Michael B. King, applicant for intervention, hereby appeals to the United States Supreme Court from the final judgment in the above-styled case, entered on June 3, 2002 and, alternatively, the court order denying King's June 25, 2002 motion for leave to intervene for the purpose of appeal, entered on or about July 3, 2002.

The clerk shall transmit the entire case record to the Clerk of the United States Supreme Court.

The clerk shall additionally include all transcripts of evidentiary hearing proceedings in this case beginning on February 4, 2002.

This 2nd day of July, 2002.

SIGNED

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(770) 478-3555

FOR THE DISTRICT OF COLUMBIA

1c

Civil Action No. 01-2111 (EGS HTE LFO)
THREE-JUDGE COURT

Filed July 2, 2002

THE STATE OF GEORGIA,
Plaintiff,

versus

JOHN ASHCROFT, et al.,
Defendants.

Before: EDWARDS, Circuit Judge,
SULLIVAN, District Judge, and
OBERDORFER, Senior District Judge.

ORDER

Michael B. King filed a third[1] renewed

[1] While entitled "Second Renewed Motion to Intervene," Mr. King's motion is actually his third renewed motion to intervene. His scecond renewed motion to intervene was filed on February 7, 2002.

motion for leave to intervene on June 25,2002. The court entered final judgment in this matter on June 3, 2002. On June 6, 2002, plaintiff filed a notice of appeal to the United States Supreme Court from this court's decisions of April 5, 2002 and June 3,2002.

Mr. King's motion is clearly untimely. *See National Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 93 S. Ct. 2591 (1973). Furthermore, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the [appellate court] and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56,58,1`03 S. Ct. 400 (1982); accord United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997). This court

entered final judgment in this matter on June 3, 2002, and plaintiff has filed notice of appeal from that judgment to the Supreme Court. Accordingly, the court is divested of jurisdiction in this matter.

Upon careful consideration of Mr. King's motion to intervene, the entire record herein, and the applicable statutory and case law, it is hereby ORDERED that this Michael B. King's renewed motion for leave to intervene [22] is DENIED as untimely and for lack of jurisdiction.

IT IS SO ORDERED FOR THE THREE-JUDGE COURT.

7-1-02
DATE

SIGNED
EMMET G.SULLIVAN
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 17 2002
OFFICE OF THE CLERK

Nos. 02-125 and 02-425

In the Supreme Court of the United States

MICHAEL B. KING, APPELLANT

v.

STATE OF GEORGIA, ET AL.

MICHAEL B. KING, APPELLANT

v.

STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL APPELLEE TO DISMISS OR AFFIRM

THEODORE B. OLSON
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Counsel of Record
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QUESTION PRESENTED

Whether the district court abused its discretion in denying appellant's belated motions to intervene in a Voting Rights Act case.

In the Supreme Court of the United States

No. 02-125

MICHAEL B. KING, APPELLANT

v.

STATE OF GEORGIA, ET AL.

No. 02-425

MICHAEL B. KING, APPELLANT

v.

STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL APPELLEE TO DISMISS OR AFFIRM

OPINIONS BELOW

The opinion of the three-judge district court denying appellant's motion to intervene without prejudice (02-125 J.S. App. 1C-3C) is unreported. The district court's opinion denying appellant's renewed motion to intervene (02-125 J.S. App. 1B-3B) also is unreported. The court's opinion denying appellant's third motion to intervene (02-125 J.S. App. 1A-124A) is reported at 195 F. Supp.2d 25. The opinion of the district court denying appellant's fourth motion to intervene (02-425 J.S. App. 1C-3C) is unreported.

JURISDICTION

The three-judge district court entered an order denying appellant's renewed motion to intervene on January 30, 2002 (02-125 J.S. App. 1B-3B). Appellant filed a notice of appeal on February 7, 2002. The district court entered its judgment denying appellant's subsequent motion to intervene on April 5, 2002, and appellant filed a notice of appeal from that judgment on April 17, 2002. The district court entered its fourth order denying appellant's motion to intervene on July 2, 2002, and appellant filed a notice of appeal on July 5, 2002. This Court has jurisdiction over those rulings on the motions to intervene pursuant to 42 U.S.C. 1973c.

STATEMENT

1. This appeal arises out of appellee State of Georgia's declaratory judgment action seeking preclearance of its redistricting plans for the United States Congress, State Senate, and State House of Representatives under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. See generally *Georgia* v. *Ashcroft*, 195 F. Supp.2d 25 (D.D.C. 2002) (three-judge court), prob. juris. noted, No. 02-182 (July 31, 2002) .

Appellant, Michael B. King, is an African-American attorney and registered voter who, at the time of this proceeding, resided in the former Georgia State Senate District 44. On December 19, 2001, appellant filed, *pro se*, a motion for leave to intervene before the three-judge district court in Georgia's declaratory judgment action. The district court initially denied the motion without prejudice on the ground that the United States had not yet identified its position with respect to the redistricting plans in question and, as a result, the court was unable to determine whether appellant's interests would be adequately represented by the existing

parties. 02-125 J.S. App. 1C-3C. The court, however, granted appellant permission to appear as amicus curiae. *Id.* at 2C. Appellant failed to do so.

2. The United States identified its legal position on December 31, 2001, indicating that it would oppose preclearance only of three state senate districts. Appellant failed to renew his motion to intervene until January 15, 2002, and even then failed to serve his motion on the parties. Because trial was scheduled to commence in two weeks, the district court expedited review of appellant's renewed motion to intervene. Appellant failed to respond to Georgia's opposition to his intervention. Appellant also failed to appear at the court's scheduled pretrial conference. 02-125 J.S. App. 20A-22A. Accordingly, on January 30, 2002, the district court denied without prejudice appellant's motion to intervene "due to his failure to appear at the January 25, 2002 pretrial conference, of which he had notice, his consistent failure to communicate with Chambers and with counsel for the parties in this matter, and the expedited nature of these proceedings." *Id.* at 2B.

On the last day of trial for Georgia's Voting Rights Act case, appellant filed a motion for reconsideration of his renewed motion to intervene, a motion to stay the proceedings before the district court, and a notice of appeal to this Court from the order denying intervention. 02-125 J.S. App. 25A. On April 5, 2002, the district court issued its judgment in *State of Georgia* v. *Ashcroft*, *supra*. 02-125 J.S. App. 1A-124A.* As part of that decision, the district court denied appellant's motion to reconsider the denial of intervention. The

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* Georgia's appeal of the district court's judgment is currently pending before this Court. See *State of Georgia* v. *Ashcroft*, No. 02-182.

court noted that appellant "failed to protect [his] interest in a timely fashion by repeatedly failing to communicate with the court, to keep apprized of the case and to comply with local filing requirements," even though appellant "knew or should have known that the proceedings were subject to expedited review." *Id.* at 24A (internal quotation marks omitted). Appellant's "failure to act in a timely matter had the potential for seriously disrupting the State's electoral process." *Id.* at 24A-25A (internal quotation marks omitted). In any event, the court ruled that appellant's notice of appeal divested it of jurisdiction to rule on his motion for reconsideration or to stay the proceedings. *Id.* at 25A-26A.

3. On June 3, 2002, the district court granted preclearance to Georgia's revised state senate redistricting plan. 02-425 J.S. App. 1A-43A. On June 17, 2002, appellant filed a jurisdictional statement (No. 02-125) with this Court. One week later, appellant filed a fourth motion to intervene with the district court. The district court again noted that the motion was untimely, but denied it on the ground that the notice of appeal deprived the court of jurisdiction. 02-425 J.S. App. 1C-3C. Appellant filed a notice of appeal from that judgment and from the June 3, 2002, judgment granting preclearance to Georgia's revised redistricting plan. *Id.* at 1B-2B. Appellant filed a second amended jurisdictional statement (No. 02-425) with this Court on September 3, 2002.

DISCUSSION

Neither of appellant's jurisdictional statements contains any argument or discussion addressing the substantiality of the questions presented or providing any reason why this Court should grant plenary review

or reverse the judgments below. That failure to comply with this Court's rules, see S. Ct. R. 18.3, alone warrants dismissal of the appeals. In the alternative, appellant's failure to abide by this Court's rules, which is simply the continuation of his pattern of failing to comply with filing and other procedural requirements before the district court, amply demonstrates why the district court's denials of his motions to intervene were not an abuse of discretion. Finally, because appellant is not a party to this litigation, he may not appeal the merits of the district court's preclearance rulings (see 02-125 J.S. ii; 02-425 J.S. ii). See, *e.g.*, *Marino* v. *Ortiz*, 484 U.S. 301, 303 (1988).

CONCLUSION

For the foregoing reasons, both appeals should be dismissed. In the alternative, the judgments of the district court should be summarily affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
RALPH F. BOYD, JR.
Assistant Attorney General
MARK L. GROSS
TOVAH R. CALDERON
Attorneys

OCTOBER 2002

Supreme Court U.S.
FILED
DEC 12 2002
OFFICE OF THE CLERK

No. 02-425

IN THE

Supreme Court of the United States

MICHAEL B. KING,

Appellant,

v.

STATE OF GEORGIA, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE STATE OF GEORGIA TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the District Court abused its discretion in denying Appellant's repeated, flawed, and untimely attempts to intervene in a case granted expedited consideration under Section 5 of the Voting Rights Act?

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

The State of Georgia, Plaintiff

John Ashcroft, in his official capacity as Attorney General of the United States, Defendant

Ralph F. Boyd, Jr., in his official capacity as Assistant Attorney General of the United States, Defendant

The United States of America, Defendant

Roielle Tyra, Defendant-Intervenor

Patrick Jones, Defendant-Intervenor

Georgia Benton, Defendant-Intervenor

Della Steele, Defendant-Intervenor

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IN THE

Supreme Court of the United States

No. 02-425

MICHAEL B. KING,

Appellant,

v.

STATE OF GEORGIA, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE STATE OF GEORGIA TO DISMISS OR AFFIRM

OPINIONS BELOW

The December 21, 2001 order of the three-judge district court denying Appellant's motion for leave to intervene without prejudice is unreported but reproduced at J.S. 1C-3C, No. 02-125.[1] The January 30, 2002 order of the three-judge district court denying Appellant's renewed motion for leave to intervene without prejudice is unreported but reproduced at J.S. 1B-3B, No. 02-125. The April 5, 2002 order of the three-

[1] Some of the relevant orders are contained in the Jurisdictional Statement filed by Appellant in his first appeal to this Court from certain orders of the three-judge district court denying his intervention, *Michael B. King v. State of Georgia*, No. 02-125, also currently pending in this Court.

judge district court denying Appellant's motion for reconsideration and, alternatively, second renewed motion for leave to intervene is reported at 195 F. Supp. 2d 25, 33-36 (D.D.C. 2002). The July 2, 2002 order of the three-judge court denying Appellant's third renewed motion for leave to intervene is unreported but reproduced at J.S. 1C-3C, No. 02-425.

JURISDICTION

The three-judge district court entered an order denying Appellant's renewed motion for leave to intervene on January 30, 2002. (J.S. 1C-3C, No. 02-125.) Appellant filed a notice of appeal from that order on February 7, 2002. (J.S. 1D-3D, No. 02-125.) The three-judge district court entered an order denying Appellant's motion for reconsideration and, alternatively, second renewed motion for leave to intervene on April 5, 2002. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 33-36 (D.D.C. 2002). Appellant filed a second notice of appeal from that order on April 17, 2002. (J.S. 1E-4E, No. 02-125.) The three-judge district court entered an order denying Appellant's third renewed motion for leave to intervene on July 2, 2002. (J.S. 1C-3C, No. 02-425.) Appellant filed a third notice of appeal from that order on July 5, 2002. (J.S. 1B-2B, No. 02-425.)

This Court has jurisdiction to consider an appeal of the denial of a motion to intervene in a case brought pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

STATEMENT OF THE CASE

On October 10, 2001, Appellee State of Georgia filed a complaint for declaratory judgment seeking a judicial determination that its Congressional, State House, and State Senate redistricting plans did not have the purpose or effect of denying the right to vote on account of race or color, in accordance with the requirements of Section 5 of the Voting

Rights Act of 1965, as amended, 42 U.S.C. § 1973c. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 29-31 (D.D.C. 2002). A three-judge district court was constituted, which granted Georgia's motion for an expedited proceeding and trial. *Id.* at 31-32.

On December 19, 2001, Appellant Michael King ("King"), an attorney and African American citizen of Clayton County, Georgia, filed *pro se* a motion for leave to intervene in the Section 5 case in order to challenge the drawing of one district in the State Senate plan. *Id.* at 33. At the time of the filing of King's first motion to intervene, the United States had not yet taken a position on whether it would object to any of Georgia's redistricting plans and, if so, which plans would be objected to. *Id.* at 32. Consequently, on December 21, 2001, the three-judge district court denied King's motion for leave to intervene without prejudice, "subject to reconsideration at such time as the United States has identified its legal position regarding plaintiff's complaint." (J.S. 2C, No. 02-125.) Additionally, the district court granted King permission to file an *amicus curiae* brief no later than January 14, 2002. (*Id.*) King never did so. *Georgia v. Ashcroft*, 195 F. Supp. 2d at 34, n.6.

On December 31, 2001, the United States indicated that it would oppose only three districts in Georgia's State Senate redistricting plan. *Id.* at 32. King did not file any renewed motion to intervene at that time or at any time permitted by the district court for him to file an *amicus curiae* brief. Instead, on January 15, 2002, King filed a renewed motion for leave to intervene, which came after most of the parties' major filings required by the district court and the setting of the case for trial. *Id.* at 34. As was consistent throughout King's filings, he failed to serve all counsel of record with a copy of his renewed motion, and the district court itself provided opposing counsel with copies. *Id.* Nevertheless, given the expedited nature of the proceedings and the

upcoming trial on February 1, 2002, the district court ordered that responses to King's renewed motion be filed by January 17, 2002, with replies filed by January 18, 2002. *Id.* Georgia objected to the intervention, and King filed no reply. *Id.* at 34-35.

The district court also entered an order scheduling a pretrial conference for January 25, 2002, and faxed King a copy of this order. *Id.* at 35. King did not appear at the pretrial conference, nor did he communicate in any way with the district court concerning the expedited schedule for this matter. *Id.* On January 30, 2002, the district court denied King's renewed motion to intervene without prejudice "due to his failure to appear at the January 25, 2002 pretrial conference, of which he had notice, his consistent failure to communicate with chambers and with counsel for the parties in this matter, and the expedited nature of these proceedings . . . . " (J.S. 2B, No. 02-125.)[2] On February 7, 2002, King filed a notice of appeal from the district court's January 30, 2002 order. (J.S. 1D-3D, No. 02-125).

The trial of this matter was conducted on February 4-7, 2002.[3] On February 7, 2002, the last day of the trial, King filed (again without serving counsel of record) a "motion for reconsideration and alternatively second renewed motion to intervene" and a "motion to stay hearing." *Georgia v.*

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[2] The district court, in discussing King's subsequent faulty attempt to intervene, reiterated its rationale for the denial of the renewed motion to intervene: "King 'failed to protect [his] interest in a timely fashion' by repeatedly failing to communicate with the court, to keep apprised of the case and to comply with local filing requirements. King knew or should have known the proceedings were subject to expedited review." *Georgia v. Ashcroft*, 195 F. Supp. 2d at 35 (quoting *NAACP v. New York*, 413 U.S. at 367).

[3] The start of the trial was delayed three days at the parties' request to enable them to complete discovery. *See Georgia v. Ashcroft*, 195 F. Supp. 2d at 35.

Ashcroft, 195 F. Supp. 2d at 35. On April 5, 2002, the three-judge district court issued its decision on Georgia's Section 5 action, granting preclearance of the state's Congressional and State House plans, but denying a declaratory judgment on the State Senate plan. *Id.* at 97. As a part of that order, the three-judge district court denied King's motion for reconsideration and motion to stay hearing as untimely and also because King's filing of his notice of appeal from the court's January 30, 2002 order divested it of jurisdiction over the issue of intervention. *Id.* at 35-36. King filed his second notice of appeal, this time from the district court's April 5, 2002 order denying intervention, on April 17, 2002. (J.S. 1E-2E, No. 02-125.)[4]

Following the three-judge district court's April 5, 2002 order, the State of Georgia requested, and the district court agreed, to retain jurisdiction to consider Georgia's enactment of a corrective State Senate redistricting plan under Section 5. *Georgia v. Ashcroft*, 204 F. Supp. 2d 4, 5 (D.D.C. 2002). By order dated June 3, 2002, the three-judge district court granted Section 5 approval to the revised State Senate redistricting plan and entered its final judgment. *Id.* at 16. On June 6, 2002, Georgia filed a notice of appeal of the final judgment of the district court, seeking this Court's review of the earlier decision denying Section 5 approval on the original State Senate redistricting plan. *See id., appeal docketed*, No. 02-182 (U.S. Aug. 6, 2002). On June 25, 2002, three weeks after this final order, King filed yet a third renewed motion for leave to intervene, again failing to serve any counsel of record. (J.S. 1C-3C, No. 02-425.) In an order filed July 2, 2002, the district court denied the third motion to intervene as untimely and because jurisdiction had been divested due to Georgia's appeal of the district court's final

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[4] King filed a jurisdictional statement relating to his first and second notices of appeal (No. 02-125) on June 17, 2002.

judgment. (*Id.*) On or about July 5, 2002, King filed his "Third Notice of Appeal" from the Court's final judgment rendered on June 3, 2002 and, "alternatively," from the district court's order denying his third motion to intervene. (J.S. 1B-2B, No. 02-425.)

King's jurisdictional statement filed with the Court in No. 02-425 contains no argument amplifying the reasons why this Court should grant his appeal, contrary to this Court's rules. *See* Sup. Ct. R. 14.1(h) & 18.3. On September 25, 2002, Georgia filed a waiver of its right to file a motion to dismiss or affirm in response to this jurisdictional statement. By letter dated November 12, 2002, the Clerk sent notice of this Court's direction to the State of Georgia to file a formal response to King's jurisdictional statement in No. 02-425.

ARGUMENT

Appellee State of Georgia respectfully suggests that this Court should dismiss King's appeal or affirm the decisions of the three-judge district court denying his motion to intervene for one or more of the following reasons:

1. *The motions were untimely.* Intervention in a federal court proceeding, even when that proceeding is brought under the Voting Rights Act, is governed by Rule 24 of the Federal Rules of Civil Procedure.

> Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

NAACP v. New York, 413 U.S. 345, 365-66 (1973).

King filed his first motion to intervene a mere six weeks before trial, after the district court granted Georgia's request to expedite proceedings under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. King filed his second renewed motion to intervene on the final day of trial, and his third renewed motion to intervene three weeks after final judgment was entered. Clearly, King's repeated attempts to intervene in this action were untimely, based upon the totality of the circumstances, and the district court did not abuse its discretion in denying the motions on that ground.

2. *King continually violated district court orders.* Although King was proceeding *pro se*, he is a licensed attorney whose continual refusal to abide by court procedures and orders provided enough reason for the district court to decline to grant him intervention. King failed to serve opposing counsel with copies of his motions, failed to comply with court administrative procedures, failed to file an *amicus curiae* brief or renew his motion to intervene within the time permitted by the court, failed to attend a pretrial conference upon the court's direction, and waited until after significant events occurred in the litigation before "renewing" his untimely motions. *Georgia v. Ashcroft*, 195 F. Supp. 2d at 32-36. It was within the district court's discretion to deny King's motions for his continuous violations of orders and procedures.

3. *The filing of King's notices of appeal on February 7, 2002, and April 17, 2002, divested the district court of jurisdiction to consider any subsequent motions to intervene.* This Court has emphasized that "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *accord Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985).

Once a notice of appeal is timely filed, the district court may not take any action that would "alter the status of the case as it rests before the [appellate court]." *Dayton Indep. Sch. Dist. v. United States Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990) (quoting *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 820-21 (5th Cir. 1989)). This includes granting a motion to intervene. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 928-29 (5th Cir. 1983) (providing collection of cases holding that filing a notice of appeal divests district court of jurisdiction to rule on motion to intervene); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 327 (7th Cir. 1980) (concluding that district court properly denied motion to intervene because simultaneous notice of appeal divested court of jurisdiction to grant motion). It also includes reexamining an order or judgment from which an appeal is pending. *See Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978) ("[T]he District Court is without jurisdiction to alter a judgment of its own while an appeal therefrom is ongoing."). Consequently, when King filed his first and second notices of appeal, it divested the district court of jurisdiction to consider any other disposition of King's attempts at intervention.

4. *King failed to satisfy any requirements for intervention under Fed. R. Civ. P. 24.* Section 5 of the Voting Rights Act contains no express provision permitting intervention, as it contemplates that the Attorney General of the United States will protect the public interest in defending actions brought pursuant to Section 5. *See Apache County v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1996) (three-judge court) ("The Voting Rights Act makes no express provision for intervention. It rather contemplates that the Attorney General will protect the public interest . . . ."). Consequently, King could not intervene under Fed. R. Civ. P. 24(a)(1) or 24(b)(1).

Even assuming intervention in a Section 5 case would be possible under Fed. R. Civ. P. 24(a)(2) or 24(b)(2), King

completely failed to satisfy any of the prerequisites for intervention under those rules. In order to intervene as of right in accordance with Rule 24(a)(2), King would have had to satisfy all four of the following prerequisites: (1) the motion must be timely; (2) the movant must have an interest relating to the subject matter of the action; (3) the movant's interest must be impaired or impeded as a practical matter if intervention is denied; and (4) the movant's interest must not already be represented adequately by existing parties. *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

First, as stated above, none of King's motions to intervene were timely filed. Given King's tardiness in filing his renewed motions to intervene, the granting of his intervention after the conclusion of the trial would have done more than cause delay in the proceedings, it would have effectively nullified the actions of all parties and the district court that already were completed. Second, King failed to show any legal interest in the Section 5 proceedings, since his own motion to intervene alleged violations of only Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which issue was not before the district court in this Section 5 preclearance action. Third, King's interest was not impaired by the outcome of the Section 5 case. King can still litigate his claims by pursuing his own Section 2 complaint.[5] Finally, the Attorney General of the United States adequately represented the interests of registered voters such as King in the Section 5 action. *See Donnell v. United States*, 682 F.2d 240, 247 (D.C. Cir. 1982) ("Congress assigned to the

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[5] In fact, King has already done so by filing an action in the United States District Court for the Northern District of Georgia, where he is currently appealing in this Court a denial of a preliminary injunction. *See Michael B. King v. State of Georgia*, No. 02-776 (jurisdictional statement filed Nov. 21, 2002).

Attorney General the primary role in vindicating the public interest under the [Voting Rights] Act.").

In order for a court to consider granting permissive intervention under Rule 24(b)(2), a movant must demonstrate "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the action." *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Moreover, "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2).

King's repeated efforts at intervention failed to meet any of these factors. King, in raising Section 2 issues, could not demonstrate an independent ground for jurisdiction in a Section 5 proceeding. King's claim had little in common with a Section 5 preclearance proceeding. Most importantly, the district court repeatedly found that King's motions were untimely and would have delayed the proceedings. Even if all requirements of Rule 24(b)(2) were met, the district court could still in its discretion deny permissive intervention. *Nat'l Children's Center*, 146 F.3d at 1048. King has failed to show why the district court erred by failing to exercise its discretion to grant permissive intervention.

5. *King fails to include any legal argument in support of* his *jurisdictional statement.* Rule 18.3 of this Court provides that "the jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule 29." Sup. Ct. R. 18.3. Rule 14.1(h) requires "a direct and concise argument amplifying the reasons relied upon for allowance of the writ." Sup Ct. R. 14.1(h). In his jurisdictional statement, King merely enumerates his version of the facts, and includes not one legal argument supporting reversal of the district court's orders.

CONCLUSION

Accordingly, for the above reasons, Appellee State of Georgia respectfully urges this Court to dismiss the appeal or, in the alternative, to affirm the decision of the district court denying Appellant's motions to intervene.

Respectfully submitted,

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Nos. 02-125 and 02-425

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL B. KING,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

MICHAEL B. KING,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

REPLY TO MOTIONS TO DISMISS

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10 pp

QUESTIONS PRESENTED

A. Whether the district court erred in denying appellant's motions to intervene as a matter of right in the declaratory action to determine whether the State of Georgia's senate redistricting map unlawfully diluted the voting strength of African-Americans in violation of Section 5 of the 1965 Voting Rights Act.

B. Whether the district court erred in denying appellant's motion to stay the Section 5 declaratory proceedings pending a decision on appellant's renewed motion for leave to intervene.

C. Whether the district court erred in entering a decision on the merits of the State of Georgia's Section 5 declaratory action after notice of appeal of the order, denying the renewed motion to intervene, was filed.

D. Whether the district court erred in considering the State of Georgia's revised senate district map under Section 5 of the 1965 Voting Rights Act after notices of appeal of the orders and judgment, denying the renewed motion for leave to intervene and motion for reconsideration, were filed.

E. Whether the district court erred in holding that the State of Georgia's revised senate redistricting map did not dilute the voting strength of African-Americans in violation of Section 5 of the 1965 Voting Rights Act.

F. Whether the district court erred in denying appellant's motion to intervene for purposes of appeal.

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FEDERAL RULES OF CIVIL PROCEDURE:

Rule 24(a)(2) 1

A. The United States Supreme Court Has Jurisdiction Over The Appeals Of The Court Orders Denying Appellant's Motions For Leave To Intervene.

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> Upon timely intervention anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the deposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Appellant has a vital interest in the appellee's senate redistricting plan. Appellant is an African-American citizen and registered voter in Clayton County, Georgia. He was moved from Georgia Senate District 44 to District 34 under the redistricting plan that is the subject of this appeal. Appellant was the only candidate the white incumbent senator faced in the 1998 and 2000 elections. Appellant received 45% of the votes in each primary election when African-American registered voters were less than 50% in Senate District 44. In 2002, African-American registered voters increased in Senate District 44 to about 60%. The appellee's 2001 and 2002 senate redistricting map reduced the percentage of African-American registered voters to less than 50%. The senate redistricting map diluted the voting strength of African-Americans in District 44 and prevented them from electing appellant as the candidate of choice.

Appellant clearly had a vital interest in the appellee's senate redistricting map. The adoption of the redistricting map by the district court affected appellant's constitutional and statutory rights to represent the African-American majority as state senator in District 44. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). In *Chiles v. Thornburgh*, the Eleventh Circuit stated:

> [I]n cases challenging various statutory schemes as unconstitutional . . . the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention.

Id. at 865 F.2d 1197, 1214 (11th Cir. 1989).

The disposition of the action in the district court impeded appellant's ability to protect his interest against a senate redistricting map that unlawfully diluted the voting strength of African-Americans in District 44. The revised map will determine the extent and nature of African-American representation in Senate District 44 for the next decade. Appellant may be foreclosed in his Section 2 action from challenging the revised map if the district court's judgment is affirmed. The litigation disadvantage appellant faced in his Section 2 action supported intervention as a matter of right. Id.

Appellant's interests were not protected by any of the existing parties. No party in the district court challenged the revised senate map on grounds that it unlawfully diluted the voting strength of African-Americans in Senate District 44. Also, the defendants and intervenors in the district court decided not to appeal the district court's June 3, 2002 Order and Judgment, granting appellee's

request for a declaratory judgment concerning the revised senate map.

Intervention was necessary to adequately protect appellant's interests in the Section 5 action where the burden of proof was on the appellee to show that its revised senate map did not unlawfully dilute the voting strength of African-Americans in Senate District 44.

Appellant filed his timely motion for leave to intervene in the pre-judgment proceedings on December 19, 2001 following the filing of the appellee's complaint for declaratory judgment on October 10, 2001. He later timely filed two renewed motions for leave to intervene prior to the final judgment and one post-judgment motion to intervene for purposes of appeal. The district court denied appellant's first motion to intervene because the court could not determine from the record whether appellant's interests were protected by the defendants. A timely hearing could have resolved any misunderstanding the district court had concerning whether appellant's interests were protected by the defendants. The court chose not to hold such hearing. Appellant filed his first renewed motion to intervene On January 17, 2002 after learning the defendant did not oppose the revised Senate District 44. On January 30, 2002, the district court denied the renewed motion to intervene because appellant did not attend the January 25, 2002 pretrial conference. Prior to the pretrial conference, appellant was not a party to the declaratory action and he was not notified by court to attend the pretrial conference as a non-party. Appellant filed a second renewed motion to intervene and notice of appeal on February 7, 2002 prior to the completion of the evidentiary hearing. The district court completed the hearing without allowing appellant to intervene and

entered an order denying the renewed motion on April 5, 2002. In this order, the court denied the appellee's request for a declaratory judgment concerning its senate redistricting map. Appellant filed his appeal of the order denying his renewed motion to intervene on April 17, 2002. On June 3, 2002, the district court amended its April 5, 2002 judgment and granted the appellee's request for a declaratory judgment concerning the revised senate redistricting map. Appellant filed his third motion to intervene and third notice of appeal.

The timeliness standard concerns not only the chronology leading up to the motions for intervention but also "all the circumstances," including:

> 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene . . . 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case . . . 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied . . . [and] 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Meek v. Metropolitan Dade County, Fla., 985 F.2d 1471 (11th Cir. 1993) (quoting *Stallworth v. Monsanto,* 558 F.2d 257, 263-66, 5th Cir. 1977).

Absolute measures of timeliness, such as how far the litigation has progressed when intervention is sought and

the amount of time that has elapsed since the institution of the action is not to be relied upon by the district court. Id. at 1479. The mere delay in determining the rights of existing parties is not a relevant consideration in deciding whether a motion to intervene was timely filed. Id. The prejudice that is relevant to the question of timeliness is that which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action. Id.

The district court erroneously failed to apply the above standard to appellant's motions for leave to intervene. Measured by such standard, the motions to intervene would be considered timely. The district court abused its legal discretion in denying appellant's first renewed motion to intervene because he did not attend, without proper notice, a pretrial conference for the parties on January 25, 2002. The court also abused its discretion in denying appellant's second renewed motion to intervene because the motion was filed the day before the evidentiary hearing was completed. The court further abused its discretion in denying appellant's third renewed motion to intervene because the appellee had filed notices of appeal. The district court's actions were contrary to established law concerning motions to intervene.

Appellant further maintains that his first notice of appeal divested the district court of jurisdiction to further consider the appellee's declaratory complaint after February 7, 2002, and the April 5, 2002 judgment was a nullity that could not be amended on June 3, 2002. The filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal". *Griggs v.*

Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). Because appellant's appeal challenged the legal validity of the appellee's revised senate map in addition to his right to intervene, the district court was divested of jurisdiction to determine whether the map unlawfully diluted the voting strength of African-Americans in Senate District 44.

CONCLUSION

Accordingly, for the above reasons, appellant respectfully urges this Court to deny the motions to dismiss or affirm and hear this appeal on the the merits.

This 30th day of December, 2002.

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